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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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Date: OCT 04 2011

Office: TEXAS SERVICE CENTER

File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Kevan S. Rhew for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, and the petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gem grading IT provider. It seeks to employ the beneficiary permanently in the United States as a product development manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not submit evidence to establish its ability to pay the beneficiary the proffered wage from the priority date onward. The petition was denied accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 6, 2008 denial, the issue in this case is whether the petitioner demonstrated the ability to pay the proffered wage from the priority date onward.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on December 11, 2007. The proffered wage as stated on the ETA Form 9089 is $47.84 per hour ($99,507.20 per year).[2]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 3 workers. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner from January 7, 2002 to October 7, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner states that the amount it paid in consulting fees to Dates, Inc. for the beneficiary's services should be considered in its ability to pay the proffered wage to the beneficiary. In support of this argument, the petitioner submitted IRS Form W-2 issued by Dates, Inc. to the beneficiary for 2007 stating that the beneficiary received $62,604 in that year. The petitioner also submitted monthly checks made out to the beneficiary from Dates, Inc. covering the period from September 30, 2007 to July 31, 2008. The petitioner also submitted monthly invoices covering the period of January 15, 2008 through September 30, 2008 from Dates, Inc. charging the petitioner $5,939.75 per month for the use of the beneficiary as a

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[2] Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. However, counsel has not provided regulatory-prescribed evidence establishing the petitioner's net income for the period from December 11, 2007 to December 31, 2007. The AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage. Therefore, the AAO is unable to determine if the petitioner's net income for that period covers the difference of $2,123.20 between the wages paid to the beneficiary during that period ($3,601.87) and the prorated proffered wage for the period ($5,725.07).

consultant.[3] The petitioner also submitted an agreement between itself and Dates, Inc. for services of the beneficiary, beginning December 11, 2002 and continuing in yearly increments through December 27, 2008, and a letter from the petitioner stating that the agreement has been in place since December 2002 (renewed annually). The amount received by the beneficiary for providing services to the petitioner in 2007 is less than the proffered wage. Therefore, the petitioner must establish that it can pay the difference between the wages paid to the beneficiary as set forth on his IRS Form W-2 and the proffered wage, which is $36,903.20 in 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 878, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

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[3] The invoice breaks down the payment to Dates, Inc. as follows: $5,216.67 in labor fees, $399.08 in FICA/Medicare reimbursement, $324 in "medical insurance premium." All invoices were the same except for the January 14, 2008 invoice which, in addition to the amounts above, included $268.46 in "SUTA paid to Pennsylvania State during 2007" and $56 in "FUTA paid to IRS during 2007." The total of the January 14, 2008 invoice was $6,264.21. The payments in excess of the $5,216.67 labor fees appear to be the employer's share of FICA, FUTA, SUTA and medical insurance premium payments. These excess amounts paid by the petitioner to Dates, Inc. will not be added to the beneficiary's wages in calculating the difference between the wages paid to the beneficiary and the proffered wage.

expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts. 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F.Supp. at 537 (emphasis added).[4]

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 12, 2008 with the receipt by the director of the petitioner's response to the request for evidence. As of that date, the petitioner's 2007 federal income tax return was the most recently available return. The petitioner's 2007 tax return states a net loss of -$408,215. The petitioner has not established that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage.[5]

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[4] On appeal, counsel states that "amortization of research and development costs represent a non-cash expense attributable to amortizing research and development costs expended in prior years by the petitioner" and concludes that the petitioner's amortization and depreciation costs should be added back to income Amortization is the deduction of expenses of intangible assets over a period of time. Like depreciation, amortization is an actual cost of doing business. As stated by the court in *River Street Donuts,* "depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, . . . even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages." *River Street Donuts,* 558 F.3d at 116. Therefore, the AAO rejects counsel's argument that the petitioner's amortization and depreciation costs should be added back to income.

[5] The petitioner also submitted its 2006 tax return. As that tax return covers a period prior to the priority date, it will be considered only generally. The AAO notes that the petitioner had a net loss of -$412,937 and net current assets of -$240,362 in 2006.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] On the Form 1120, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2007 tax return stated net current assets of -$19,710. The petitioner has not established that it had sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary through an examination of wages paid to the beneficiary, the petitioner's net income, or its net current assets.

The petitioner submitted two letters from CPAs with Avrach & Taylor, dated October 18, 2007 and November 5, 2008, which stated that the losses reflected on the petitioner's 2006 and 2007 tax returns were due to depreciation and amortization expenses, which should be added back to demonstrate positive income.[7] The 2007 letter stated that the petitioner's projected salary expense for 2007 to 2009 "will be reduced" and that the petitioner is forecasted to have the ability to pay the proffered wage in those years.[8] [redacted] provides no support or reasoning for his statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] The 2007 letter was written by [redacted] and the 2008 letter was written by [redacted]. The AAO rejects the argument that the petitioner's amortization and depreciation costs should be added back to income. *See supra* note 4.

[8] Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner also submitted profit and loss statements covering 2007 and January through September 2008.[9] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The petitioner was incorporated in 1998 and employs 3 workers. The record only contains two tax returns. Thus, the AAO is unable assess the company's historical growth since 1998, but we note that the petitioner's gross receipts for 2007 were less than those for 2006.[10] It had a net loss and negative net current assets in 2006 and 2007. In addition, the petitioner submitted no information or evidence about its reputation or any similarities to liken the petitioner's situation to that of the petitioner in *Sonegawa.* Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

[redacted] stated in his 2008 letter that the financial performance of the petitioner during the 9-month period ending September 30, 2008 supports the ability to pay the proffered wage.

[10] In 2007, the petitioner's gross receipts were $155,827; in 2006, its gross receipts were $228,260.

ORDER: The appeal is dismissed.